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No. 82-432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, authorize a district court, on the basis of a suit by individual union members, to order a union to conduct an election of officers utilizing election rules and procedures not contained in the union's bylaws but, rather, prescribed by the court and under the supervision of third parties who are not associated with the union and who were appointed by the court?

2. Do the remedies prescribed by §§ 402 and 403 of the Act, 29 U.S.C. §§ 482 and 483, for resolving disputes concerning the election of union officers proscribe the jurisdiction of the district court to enjoin the tabulation of ballots cast after the balloting process has been virtually completed?

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts is reported at 521 F. Supp. 614, and is

reprinted in Appendix A of the Petition for a Writ of Certiorari (Pet. App. A at 1a-40a) filed on September 13, 1982. The opinion of the United States Court of Appeals for the First Circuit is reported at 679 F.2d 978, and is reprinted in Appendix B of the Petition, at pages 41a-93a.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on May 21, 1982 (Pet. App. C at 94a). On June 15, 1982, the Court of Appeals entered an order denying Defendants-Appellants' petition for rehearing and suggestion for rehearing en banc (Pet. App. D at 95a). The Petition for a Writ of Certiorari was filed on September 13, 1982, and was granted on January 24, 1983. This Court has jurisdiction to review the judgment of the court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Titles I and IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 411-412, 481-483, the pertinent parts of which are reprinted in Petition Appendix E, at pages 96a-103a.

STATEMENT OF THE CASE

Introduction

The district court, acting upon the suit of members of Local Union 82 under § 102 of the LMRDA, entered an injunction prohibiting the local union from opening mail ballots cast in its triennial election of officers on the day before those ballots were to have been retrieved from their post office box repository. The district court directed the Local to conduct a new nomination meeting and election utilizing terms specified by the court, which differed from those contained in the Union's bylaws, and under the supervision of third parties not associated with the Union but, rather, appointed by the court.

The court of appeals affirmed the appropriateness of the remedies imposed, finding that the procedures set forth in § 402 of the Act were not activated until all of the ballots cast in an election were tabulated. Both courts rejected the Union's arguments that the district court: (a) exceeded the scope of its statutory authorization under § 102 because the remedy entirely subverted the statutory scheme which vests the exclusive authority to conduct rerun elections of union officers in the Secretary of Labor and, (b) lacked jurisdiction to consider the complaint under Title I. These are the issues that this Court has granted certiorari to review.

STATEMENT OF FACTS

Local Union 82 is a labor organization, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and is required to conduct its election of officers no less frequently than once every three years. § 401(b), 29 U.S.C. § 481(b) (Pet. App. E at 98a). Plaintiffs are members of that Union, which consists of approximately seven hundred employees of companies engaged in the furniture moving business in the Boston area. The Union is governed by a seven-member elected executive board. At the time suit was brought, Bart Griffiths was the elected secretary-treasurer and principal executive officer, and George Harris was the elected president.[1] The Local Union had conducted previous elections by mail referendum balloting (R. 288-89) and the executive board exercised its discretion under the Union's bylaws and constitution to utilize that method of voting in the 1980 election (Pet. App.

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[1] The Local Union has a history of contested elections of officers, Griffiths having been elected to the office of Secretary-Treasurer for the first time in the 1977 election (R. 394) and Harris having served two prior terms as the Local's President (JA 91; R. 377). Both Harris and Griffiths had opposition in the 1977 election, the former defeating plaintiff Anthony Coyne (R. 394-95; JA 92).

A. at 17a).[2] The ballots were scheduled to be tabulated on December 13, 1980, and had to have been returned to a designated post office box by 9:00 a.m. on that date in order to be counted (Exh. 12, Pet. App. H at 113a).

As the court of appeals noted, this case concerns only one event, the meeting held on November 9, 1980, for the nomination of candidates for the seven elected positions in the Local (Pet. App. B at 43a). It is undisputed that the meeting was attended by more members than any conducted by the Local in the prior two years,[3] in part due to the membership's interest in the election[4] but also because the incumbent officers had moved the meeting location to a site more convenient for the members.[5]

At the start of the November 9, 1980 meeting, a dispute arose over the requirement that members verify their good standing status within the Union, a requisite for attending and participating in the nomination meeting.[6] The Local required members to produce a computerized receipt (TITAN receipt) showing that dues had been paid through the month of October, 1980 (Pet. App. B at 43a).[7] Several members, including plaintiff

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[2] Article XXII, Section 4(b) of the 1976 Teamsters Constitution provided, in part, that: "The Local Union Executive Board shall have the authority to establish all rules and regulations for the conduct of the election . . . including the authority to use mail referendum balloting or absentee balloting without membership approval" (Exh. 2 at 137, R. 611).

[3] (R. 400-01; 174).

[4] Pet. App. B at 43a.

[5] (R. 401-02).

[6] Article XXII, Section 4(a) of the Constitution provided, in part, that: "To be eligible to nominate and otherwise participate in the nominations meeting, a member must have his dues paid through the month prior to the month in which the nominations meeting is held" (Exh. 2 at 135, R. 609).

[7] The meeting notice had included the statement that "members must have their receipts on their person and be paid for the month

Jerome Crowley, were refused entry when they failed to produce the necessary record. A delegation of rank and file members met with Griffiths about waiving the requirement, but Griffiths refused. However, he offered to delay the meeting so that Crowley and the other members without the TITAN receipts could return to their homes to obtain them, but this offer was rejected by plaintiff Robert Lunnin (Pet. App. B at 43a; R. 411-12).

Thereafter, Griffiths opened the meeting and announced that the Local Union's requirement that a member attend 50% of the membership meetings conducted in the prior two years in order to be eligible to run for office would not be enforced (Pet. App. A at 19a-20a). As a result, the only requirement to become a candidate for office was that a member's dues had to have been paid in a timely manner during each of the twenty-four consecutive months prior to the month in which the nomination meeting was conducted ("24 month rule"). (Pet. App. B at 44; Rule printed in Pet. App. A at 2a, n.3).

By all accounts, the meeting was disorderly (Pet. App. A at 20a). When nominations for the office of secretary-treasurer were opened, Griffiths was nominated and the nomination was seconded (*Id.*). According to the Local Union, nominations were then closed for that office. John Perry, plaintiff Lynch, and Harris, the incumbent, were then nominated to run for the office of president. Lynch testified that he was nominated to run for the office of president (R. 563), but other plaintiffs contended that Lynch was nominated for the office of secretary-treasurer,

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of Oct." (Pet. App. A at 18a). The TITAN receipt was the only document utilized by the Union which indicated whether the member was current or delinquent in the payment of dues. *Compare* Exh. 19 *with* Exh. 20 (R. 592 and 593). Exh. 19 is a "temporary receipt" and does not indicate the month to which the amount of dues paid by the member has been applied. Exhibit 20 is a "TITAN receipt" and shows a payment on December 18, 1980 which paid the member's dues through the month of November, 1980.

and the district court so held.[8] Nominations for the remaining five offices were less controversial (Pet. App. B at 44a). The most important event during the nomination meeting for purposes of this litigation was the recording of Lynch's nomination.

Balloting packets were subsequently distributed to the local union's membership during November, 1980, and included instructions that ballots be deposited in the mail by December 12, 1980, in time to be recovered from the designated post office at 9:00 a.m. on December 13, 1980 (Exh. 42, Pet. App. H at 115a-16a; R. 425). The ballots were to be tabulated immediately thereafter.

PROCEEDINGS BELOW

A. The District Court

Plaintiffs filed suit on December 1, 1980 (JA 1, Dkt. No. 1), after the balloting packets had been mailed to Local 82's members,[9] invoking the district court's jurisdiction under § 102 of the LMRDA, 29 U.S.C. § 412 (Pet. App. E at 98a). A total of ten "claims" were made, nine of which involved events which occurred prior to or during the nomination meeting.[10] Five "claims" charged de-

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[8] The court of appeals noted the disparity between Lynch's testimony and the finding of the district court, but refused to set aside the district court's conclusion as being clearly erroneous (Pet. App. B at 69a-70a).

[9] The precise date on which the ballot materials were mailed to the membership is not in the record, but the Motion for Preliminary Injunction refers to the ballots having been previously distributed (JA 37, ¶ 4).

[10] The final "claim," a § 101(a)(5) allegation, involved internal union charges brought against Lunnin by Griffiths several days after the nomination meeting as a result of an incident during the nomination meeting (JA 30-31, ¶ 37-39). The Local Union hearing panel rendered a decision which was reversed by Joint Council 10, pursuant to the appellate procedure set forth in the Union's constitution (Pet. App. A at 6a, n.6). No discipline was ever effectuated (JA 98). This resolved that aspect of the Complaint to the satisfaction of all parties (R. 500).

nial of equal rights in violation of 29 U.S.C. § 411(a)(1)[11] (JA 31-32, ¶ 43, 44, 46-48); three alleged denial of the right of free speech in violation of 29 U.S.C. § 411(a)(2)[12] (JA 32-33, ¶ 45, 50, 51); and one charged a violation of the right to nominate candidates as protected by 29 U.S.C. § 481(e)[13] (JA 32-33, ¶ 49). The plaintiffs sought injunctive relief in the form of an order nullifying the November 9, 1980 nomination meeting (JA 37, ¶ 3), directing the Union to reopen nominations (JA 37, ¶ 5), and modifying the Union's candidate-eligibility rules (JA 37-38, ¶ 7). Plaintiffs also sought an award of damages and attorney fees (JA 33, ¶ 5, 6).

From the outset, plaintiffs maintained that they could only receive full relief if the district court addressed the propriety of the Union's "24 month rule" for determining candidate-eligibility (JA 80), even while they conceded that such a determination raised Title IV, not Title I, questions (*Id.* at 80). Plaintiffs asserted that a district court could resolve Title IV issues in a pre-election context under § 102 so long as Title I allegations were raised in the Complaint. (R. 524-25).

The district court issued a temporary restraining order at 4:20 in the afternoon of December 12, 1980, the day before the ballots were to be tabulated and the last day on which they could be marked and mailed (Pet. App. F at 104; JA 2, Dec. 12). The district court specifically stated that it was issuing the injunction to prevent the election from being "consummated" in order to "protect the jurisdiction of this Court" (JA 84, 47). The Local Union was enjoined from tabulating the ballots and was directed to deliver into the district court's possession all ballots which were in the post office box at 9:00 a.m. on December 13, 1980.

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[11] Pet. App. E at 96a.

[12] *Id.*

[13] *Id.* at 99a-100a.

Thereafter, a five day evidentiary hearing on the motion for preliminary relief was conducted during December, 1980. On January 9, 1981, in an attempt to resolve all outstanding Title I allegations (JA 100), counsel for defendants advised the court that the Local Union was willing to conduct a new nomination meeting and election during March and April, 1981 (JA 97, 53, 100). Plaintiffs rejected the offer for a number of reasons, among which was their fear that a new election held under defendants' proposal would be "attackable by any member of the union in a post-election proceeding before the secretary, by the Secretary of Labor" (JA 101). According to plaintiffs, an election held pursuant to an order of the district court would be conducted under that court's supervision, with complaints concerning the election to be resolved by the court, rather than the Secretary of Labor (*Id.*).[14]

The district court found defendants' offer insufficient, and attempted to mediate the differences between the parties, reserving ruling on the outstanding issue of the propriety of the twenty-four month candidate-eligibility rule (R. 484-85, 494-95). Meanwhile, plaintiffs renewed their argument that the candidate-eligibility rule should be considered under Title I (JA 100) and requested extensive discovery which, they acknowledged, would further delay any election (JA 103).

Additional hearings on the procedures of the proposed rerun election were conducted on January 15 and 23; Feb-

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[14] In their brief to the court of appeals, plaintiffs reaffirmed their opposition to the Local Union's offer on the ground that "an election rerun solely on account of the unilateral decision on the part of the local union . . . would therefore be subject to being vacated by either a challenge to the International Union or the Secretary of Labor by one of the original candidates. Yet, if the new election were conducted pursuant to Court Order, no such challenge could be made." Plaintiffs' Appellate Brief in Response, at 32.

ruary 20 and 27; March 6; and April 23, 1981.[15] The district court was unable to resolve the outstanding differences between the parties, the fundamental dispute being over the defendants' insistence that the court lacked jurisdiction under Title I to order a labor organization to conduct an election of officers utilizing procedures other than those specified in the union's governing rules (R. 66-70; JA 111).[16] The court repeatedly assured defendants that they would not waive their underlying objections to the court's jurisdiction by participating in the process by which the court drafted its ultimate order (JA 110, 111-112). At the close of the court's efforts to mediate an election settlement, defendants once again advised the court that they intended to appeal any order directing a new election based on their contention that the court lacked jurisdiction to consider the entire Complaint (R. 575-76, 585-86, 588).

The district court issued a preliminary injunction and memorandum opinion on July 13, 1981 (Pet. App. A at 1a-40a). The court found that it had Title I jurisdiction on the basis of the allegations that the defendants had violated §§ 101(a)(1) and (2) by imposing the TITAN dues receipt requirement as a condition of admission to the nomination meeting and by refusing to allow Lynch to run for the office of secretary-treasurer (*Id.* at 13a). The district court concluded that it lacked Title I juris-

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[15] In addition to the hearings, the district court issued proposed orders on February 12, 1981 (JA 63-68) and April 21, 1981 (JA 69-75) and solicited the positions of the parties with respect thereto. Moreover, after the Local offered to conduct a second election, the district court permitted plaintiffs to amend the complaint to raise an issue subsidiary to the twenty-four month candidate-eligibility rule (JA 61-62). An evidentiary hearing on that matter was conducted on March 6, 1981.

[16] Both the district court and plaintiffs recognized the significant jurisdictional question as to whether the court could order a new election on terms other than those proposed by the Local Union (JA 101-02).

diction to review the union's candidate-eligibility rules and also found that plaintiffs had not established a reasonable likelihood of success on their claim that those rules had been imposed in retaliation for their exercise of § 101(a)(2) free speech rights or had been discriminatorily applied (*Id.* at 12a, 22a-23a).

To remedy the two nomination-meeting-related violations over which it concluded it had jurisdiction, the district court entered an injunction nullifying the November 9, 1980 nomination meeting, restraining the Union from counting the ballots cast in the December 13, 1980 election, and ordering a new nomination meeting and election under terms and conditions established by the court (Pet. App. B at 86a-93a). The court appointed third parties who were neither officers nor members of the union to supervise the new nomination and election [17] and authorized them to render decisions concerning the eligibility of candidates and voters, bypassing the union's constitutional procedures (Exh. 2, Article XXII, Section 5(a) at 139; R. 613). The third parties were also vested with responsibility for other aspects of the election, although no issue had been raised as to the propriety of the Union's actions with regard to these aspects of the first election (*e.g.*, Pet. App. B, ¶ 5(j) at 91a). The Union was directed to bear the entire cost of employing these third parties as well as the expenses incurred in conducting the election. Defendants' request for a stay of those aspects of the injunctive order directing that a new election be held immediately was denied by the district court, as was defendants' request that plaintiffs be

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[17] The district court's decision indicates that the defendants did not object to the third parties appointed to supervise the rerun election (Pet. App. A at 38a). While it is accurate to say that defendants did not specifically object to the particular third parties selected, defendants repeatedly objected to the court's authority to appoint *any* third party to conduct the election (JA 110, 111), an objection acknowledged by the court during trial (JA 111-12).

required to post a bond to secure the costs of the new election (Pet. App. A at 38a-40a).

Thereafter, the district court retained jurisdiction over all aspects of the case not directly involved in the appeal filed with the circuit court. An additional hearing was conducted on August 26, 1981 to modify the election schedule (JA 8, Aug. 26). The court was required to issue an additional order concerning election procedures on October 23, 1981 (JA 11, Dkt. No. 122), as a result of five letters to the court requesting clarifications of the election rules.[15] Another order regarding the eligibility of a nominee to run for office was required when the third parties were unable to resolve that question (JA 12, Dkt. No. 125). The results of the election ordered by the court were not determined until December 12, 1981, exactly one year after the originally scheduled election. During that period, the executive board which had been elected in 1977 continued in office.

Presently pending before the district court is plaintiffs' counsels' renewed application for attorney fees, originally filed on August 26, 1981 (JA 9, Dkt. Nos. 94-99), which has already been the subject of two hearings (JA 12, Nov. 20; Brief App. at 1a) and two orders of the court (JA 9, 13, Dkt. Nos. 106, 127). Also pending is plaintiffs' motion filed on February 2, 1983 alleging that Griffiths had violated the terms of the July 13, 1981 injunction (Brief App. at 1a). The district court conducted a conference on that motion on March 31, 1983, and further proceedings have been directed.

B. The Court of Appeals

An appeal was taken from the district court's decision, pursuant to 28 U.S.C. § 1292. Defendants' motion for a stay of the order to conduct an election pending appeal was denied by the Court of Appeals for the First Circuit

[15] (JA 10-11, Dkt. Nos. 108-09, 113-14, 120).

(JA 17). On December 28, 1981, the Secretary of Labor's motion for leave to intervene as an appellant was granted (JA 18). The First Circuit panel which heard the appeal issued a majority opinion and judgment affirming the district court's decision (Pet. App. B at 41a-93a).

Addressing the jurisdictional question, the majority of the panel held that the district court properly exercised its authority under Title I to remedy the two statutory violations which occurred at the nomination meeting. The court then focused on the word "conducted" in § 403, 29 U.S.C. § 483, and concluded that a suit involving election-related issues was not subject to the exclusive jurisdiction of the Secretary of Labor "until all the ballots are counted" (Pet. App. B at 67a). While the court of appeals acknowledged that the legislative history was silent as to the precise point at which an election has been "conducted," and noted that this Court has consistently recognized the role of the Secretary of Labor in resolving election-related disputes, it read this Court's decisions in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972) and *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), as undercutting the policy of judicial noninterference in union elections articulated in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964). (Pet. App. B at 52a) The panel held that requiring members to rely on the Secretary of Labor for resolution of election problems will result in the non-enforcement of important statutory guarantees.[19]

Writing in dissent, Circuit Judge Campbell was "unable to read Title I as extending so far as to allow a district court, once balloting has commenced, to invalidate an election and order a new one under its super-

[19] "[F]oreclosure of Title I claims once balloting begins would prevent effective relief for violations that occur during the election, such as denial of access to the polling place or failure to provide a minority with ballots" (citation omitted) (Pet. App. B at 66a).

vision and under terms and conditions extemporized by the courts and parties" (Pet. App. B at 82a). He recognized that the majority's decision "would allow relief under Title I (ordering and supervising a new election) which heretofore has existed only under Title IV" (*Id.* at 83a). Rejecting the majority's finding that Titles I and IV could be accommodated merely by determining the point in the election process at which a complaint had been filed, Circuit Judge Campbell would have made that determination turn on the nature of the relief requested as well as the stage which the election process has reached (*Id.* at 83a-85a).

SUMMARY OF ARGUMENT

1. The decisions below are contrary to the intent of Congress and the prior ruling of this Court which have defined the scope of the rights protected by the various sections of the LMRDA. That Act was drafted by a Congress which was determined to eliminate "abuses . . . confined to a few unions" while being "careful neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees."[20] Nevertheless, the courts below undermined Congress' determination to preserve a strong and independent labor movement by superseding the Union's rules and ignoring its internal dispute-resolution procedures. Moreover, the courts' decisions prevented the Union's members from electing their constitutional officers within the statutory period.

Congress did not intend any of these consequences to result from the passage of the LMRDA. Rather, a review of the legislative history reveals that Congress ulti-

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[20] S. Rep. No. 187, 86th Cong., 1st Sess. at 5 (1959); *reprinted in* National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, (1959) [hereinafter "Leg. Hist."], at 401.

mately chose to prescribe minimal standards for union self-government in order to rectify the abuses first disclosed by the Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee). S. Rep. No. 1684, 85th Cong., 2d Sess., at 4-5 (1958). And this Court has recognized that the Congressional statement of rules regulating the election of union officers was set forth in Title IV, not Title I, of the statute. *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 498 (1968). Moreover, Congress chose the Secretary of Labor, not the federal courts, as the agent to determine whether there had been compliance with those election standards. *Calhoon v. Harvey*, 379 U.S. 134, 140 (1964).

Section 403 of the Act provides that the exclusive remedy for a violation of Title IV which may have affected the outcome of an election is a rerun election conducted under the supervision of the Secretary of Labor. *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 475 (1968). Pre-election remedies were deliberately limited to proceedings in state courts to enforce provisions of a union's bylaws and constitution, unless otherwise specifically stated. Rather than permit individual union members to enforce election rights, Congress established remedial procedures in § 402 which satisfied its goals of affording members honest elections of officers without unnecessary governmental interference. *Id.* at 470-71; *Hodgson* v. *Local 6799, USWA*, 403 U.S. 333, 339 (1971). This Court has recognized § 402 as being deliberately designed to afford unions the opportunity to correct any election violation themselves,[21] to prevent a small faction from delaying an election,[22] and to minimize the disruptive effects of election-related litigation on a union's administration.[23] Not one word of the legislative history

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[21] *Glass Bottle Blowers*, 389 U.S. at 472.

[22] *Calhoon*, 379 U.S. at 140.

[23] *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 532 (1972).

suggests that Congress intended the exclusive Title IV remedy of conducting a new election to be utilized by a court acting under Title I. Nor does the legislative record support the theory that Congress intended to have a district court supplant, under any circumstances, the Secretary of Labor as the governmental agent responsible for supervising rerun elections.

The First Circuit's conclusion that Congress added Title I to supplement the electoral procedures of Title IV because of a lack of faith in the Secretary's enforcement abilities or to authorize judicial activism in the area of union elections[24] is unsupported by the legislative history and inconsistent with the decisions of this Court which have interpreted the statutory scheme.

2. If, as the lower court held, a district court has jurisdiction to order and supervise a rerun election of officers under § 102 before an election has been "conducted," then the Court must determine the point at which a mail ballot election has been "conducted" for purposes of ousting that jurisdiction and for invoking the exclusive jurisdiction of the Secretary of Labor under § 403. It is submitted that in this case the election was "already conducted" at the time suit was filed because the balloting process had commenced and the relief requested by plaintiffs necessitated the conduct of a new election. Since that remedy is a Title IV remedy, and since Congress intended that remedy to be utilized only by the Secretary of Labor, it follows that an election is "conducted" whenever the relief requested would require the nullification of ballots already cast and require a rerun procedure.

The First Circuit's determination that an election is not "conducted" until the ballot tabulation process is completed[25] is inconsistent with the aforementioned Con-

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[24] Pet. App. B at 59a, 67a.

[25] Pet. App. B at 65a, 67a.

gressional interests and is inconsistent with the holdings of other courts. *McDonough* v. *Local 825, Operating Engineers*, 470 F.2d 261, 264 (3d Cir. 1972); *Libutti* v. *DiBrizzi*, 337 F.2d 216, 218 (2d Cir. 1964); *New Action Coalition* v. *Local 2, United Fed. of Teachers*, 510 F. Supp. 1208, 1211 (S.D.N.Y. 1981); *Laski* v. *Inter. Org. of Masters, Mates & Pilots*, 502 F. Supp. 134, 136 (S.D.N.Y. 1980); *Jennings* v. *Carey*, 57 L.R.R.M. 2635, 2641 (D.D.C. 1964).

Adoption of the First Circuit's inflexible rule will promote "races to the courthouse" and will result in the circumvention of the Title IV enforcement procedure whenever an offense actionable under that section of the statute also could be characterized as involving Title I.

ARGUMENT

I. SECTION 102 OF THE LMRDA DOES NOT AUTHORIZE A DISTRICT COURT TO ORDER A RERUN ELECTION OF UNION OFFICERS, TO APPOINT THIRD PARTIES TO CONDUCT AN ELECTION, OR TO PRESCRIBE ELECTION RULES

The LMRDA was the product of a legislative effort to make unions more responsive to their membership and to ensure that members could influence "policy and leadership by free and periodic elections." [26] In approaching its task, Congress considered two alternatives, the first required detailed government regulations covering numerous aspects of a union's internal administration and was supported primarily by the American Civil Liberties Union.[27] The second approach recognized unions as es-

[26] S. Rep. No. 187, *supra* n.20, at 7; I Leg. Hist. at 403.

[27] The ACLU had proposed broad legislation to govern the internal affairs of unions as early as 1947 and reintroduced its proposals in 1958. Those proposals vested enforcement authority in the National Labor Relations Board, eliminated the historic "exhaustion of internal union remedies doctrine", and prohibited unions from subjecting "any member to any unreasonable rules or handi-

sentially private organizations and suggested minimal government intervention in their internal affairs.[28] The Senate Labor and Public Welfare Committee which drafted the 1959 legislation rejected the ACLU approach and "recognized the desireability of minimum interference by Government in the internal affairs of any private organization . . . [and] strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business." [29]

While that Committee's Report was drafted before the "bill of rights" provision which subsequently became Title I was added to the Act, the record confirms that the Committee's intent to minimize governmental interference survived the legislative process. A review of the evolution of Titles I and IV supports the conclusion that Congress did not intend to authorize broad pre-election intervention in a union's electoral processes.

A. The Legislative History of Title IV

The present Title IV had its genesis in the 1958 Kennedy-Ives bill, S.3974, a proposal drafted in conformance with the "general philosophy of legislative restraint." [30] The election provisions of that bill were to be enforced by the Secretary of Labor, upon complaint of any union member. State laws regulating union elections were to be inapplicable and litigation by private individuals was precluded.[31] The Kennedy-Ives bill was

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caps." Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 Ill. L. Rev. 631, 636-37, 644, 656, 667 (1949); Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 Minn. L. Rev. 199, 201-03 (1960).

[28] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 856-57 (1960) [hereinafter, *"Aaron"*].

[29] S. Rep. No. 187, *supra* n.20, at 7; I Leg. Hist. at 403.

[30] S. Rep. No. 1684, 85th Cong., 2d Sess., at 5 (1958).

[31] *Id.* at 13.

criticized by some members of the Senate Labor Committee as an unwarranted intrusion into the internal affairs of a private association [32] as well as by others who felt that it was inadequate in that it failed to implement the McClellan Committee's recommendation that "vital union decisions" other than elections of officers be made by secret ballot vote of the membership.[33]

In spite of these concerns, the Committee unanimously supported authorizing the Secretary of Labor to administer the procedures for conducting rerun elections. And on the floor, the Senate rejected an amendment which would have undercut such authority by permitting private suits to enforce election rights where the Secretary did not choose to challenge an election.[34] The Senate reaffirmed its faith in the Secretary's ability to establish the procedures for conducting elections by defeating an amendment proposed by Senator Mundt which would have specified such details in the general electoral requirements of the bill.[35] On June 14, 1958, the Kennedy-Ives bill was approved by the Senate by a vote of 88-1,[36] but was defeated in the House.

When the Kennedy-Ervin bill, S.505, was introduced in 1959, it contained union election provisions which were somewhat more detailed than those contained in the

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[32] *Id.* at 45 (Sen. McNamara).

[33] *Id.* at 49, 53 (Supplementary and Minority Views).

[34] 104 Cong. Rec. 1105 (1958), reprinted in Department of Labor, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-VI (1964)*, at 711 [hereinafter, "DL Leg. Hist."].

[35] *Id.* at 760. In so doing, the Senate accepted Senator Morse's recommendation that "what we ought to do is to leave [the bill's provisions governing election details] to the Secretary of Labor and to the courts for interpretation and application in case disputes do arise." *Id.* at 759.

[36] 104 Cong. Rec. 11486-87 (1958).

Kennedy-Ives bill but which "did not affect the theory or basic subject matter of the measure." [37] The bill retained the provision for enforcement of election regulations by the Secretary of Labor, as did S.1002, a more detailed bill introduced by Senator Mundt, and S.1137, introduced by Senator McClellan.[38] The Administration bill, S.748, provided for enforcement of election procedures through suits by individual members in those instances in which the Secretary chose not to sue.[39] Yet it is of especial significance to this case that all of these bills provided that violations be redressed by setting aside improper elections and conducting rerun elections under the supervision of the Secretary.[40] Additionally, S.505 and S.1002, the only two proposals to address the question of the rules to be utilized in a court-ordered rerun election, specifically authorized the Secretary to prescribe such rules.[41]

The bill reported by the Labor Committee, S.1555, provided for enforcement suits by the Secretary only, and vested in the Secretary authority to supervise rerun elections and to prescribe election rules and regulations.[42] It reflected the Committee's belief "that the broad powers

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[37] Cox, *Internal Affairs of Labor Unions Under the Labor-Reform Act of 1959*, 58 Mich. L. Rev. 819, 822 (1960) [hereinafter, *"Cox"*]. Professor Cox was a member of the Labor Law Advisory Panel which assisted the Senate Labor Committee in the drafting of its bill, S.1555. DL Leg. Hist. at 95.

[38] I Leg. Hist. at 154-55, Section 7 (S. 1002); and at 309-310, Section 404 (S. 1137).

[39] *Id.* at 112, Section 302(d).

[40] *Id.* at 63 (S. 505); 155 (S. 1002); 310 (S. 1137); 129 (S. 748).

[41] *Id.* at 63 (S. 505); 155 (S. 1002).

[42] *Id.* at 376, Section 302(b). In introducing the bill, its co-sponsor, Senator Kennedy, noted that the legislation granted the Secretary of Labor "the right to set [an] election aside." II Leg. Hist. at 1113.

granted to the Secretary . . . combined with full reporting and disclosure to union members and the public provides a most effective combination of devices by which abuses can be corrected." [43] Not only did the Committee not diminish the Secretary's authority during the legislative process, but, to the contrary, it significantly expanded that authority by assigning the responsibility of supervising unions' recall election procedures to the Department of Labor.[44] The proposal contained in S.1555 to utilize the Secretary of Labor as the sole and exclusive agent to enforce regulations governing the election of officers provoked no debate in the Senate.

All of the major bills in the House incorporated the Senate's provision requiring that rerun elections be conducted by the Secretary.[45] The bill approved by the House required that any new election ordered by a district court was to be conducted by the Secretary, although it also contained a provision allowing for post-election suits to be brought by individual members seeking to set aside an election.[46] In conference, the Senate's enforcement procedure which relied entirely upon the Secretary to determine when to bring a suit seeking to set aside an election, was adopted in its entirety.[47]

This legislative review establishes that, in both chambers, the Secretary of Labor was designated as the sole and exclusive government agent authorized to supervise rerun elections of union officers and to fashion appropriate rules for conducting such elections. The proposals

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[43] S. Rep. No. 187, *supra* n.20, at 34; I Leg. Hist. at 430.

[44] *Id.* at 93.

[45] *See*, I Leg. Hist. at 658 (Landrum bill, H.R. 8400); 728 (Elliott bill, H.R. 8342); 907 (Shelley bill, H.R. 8490).

[46] *Id.* at 658.

[47] H. Rep. No. 1147, 86th Cong., 1st Sess., at 35, *printed in Id.* at 939.

for federal pre-election remedies were rejected in favor of post-election relief. Only state causes of action were permitted prior to the conduct of the election.[48] Thereafter, only the Secretary of Labor could bring suit to set aside an improperly conducted election and, once a new election was ordered, the Secretary of Labor was responsible for insuring that it was conducted in accordance with the Act.

B. The Legislative History of Title I

Consistent with the above, the history of Title I provides no support for the First Circuit's conclusion that district courts may supervise rerun elections of officers under that Title. Nor, contrary to the lower court's findings, does the legislative history of Title I evidence Congressional dissatisfaction with either the Secretary of Labor's enforcement abilities or the adequacy of the Title IV enforcement procedures to correct election irregularities (Pet. App. B at 59a, 67a).

1. *The "Basic Rights" Protected*

Title I was adopted in order to guarantee rights not otherwise specifically protected in the legislation. One of the major criticisms of the 1958 Kennedy-Ives bill was that it allegedly failed to afford members the minimum standards of democracy necessary to ensure them an opportunity to participate in "vital union decisions" other than the election of officers.[49] Issues for which no right to vote was provided included bylaw amendments, strike questions, and contract proposals.[50]

The introduction of S.505 in 1959 without provisions dealing with these issues led Senator McClellan to in-

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[48] The legislative history of § 403 is discussed at pages 31-33, *infra*.

[49] S. Rep. No. 1684, *supra* n.30, at 52-53.

[50] *Id.* at 56-57; *see*, DL Leg. Hist. at 714 (Sen. Knowland).

troduce S.1137 which included a title, denominated "Rights to Be Guaranteed In Charters of Labor Organizations," covering many of the subjects included in Title I of the current law.[51] When S.1137's "basic rights" provisions were rejected by the Senate Labor and Public Welfare Committee which reported S.1555, Senator McClellan offered those provisions on the floor of the Senate as an amendment to S.1555 in order to "define and describe those rights, which are basic, and which every citizen of the country is entitled to."[52] In so doing, the Senator affirmed his adherence to the basic philosophy of legislative restraint which had guided the Senate in its formulation of the legislation to that point. He described the contents of his amendment as the "minimum standards of democratic processes," "the very minimum," "the basic principles" required to address specific abuses disclosed during his committee's hearings.[53]

The legislative debate which ensued focused on the role of the federal government in protecting private rights in relation to the responsibilities of the states. The opponents of the McClellan amendment adhered to the view that existing state laws, supplemented by the protections incorporated in S.1555, were adequate to protect the "basic rights" covered by the amendment.[54] They attacked the McClellan proposal for its breadth, alleging that the amendment would transform a Congress committed to limited intervention in the affairs of private organizations into "a constitutional convention for the free labor movement in the United States," and was unnecessary in view of the bill's incorporation of the protection afforded by existing law.[55] The proponents did not

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[51] I Leg. Hist. at 267-271.

[52] II Leg. Hist. at 1096, 1106.

[53] *Id.* at 1098, 1100, 1103.

[54] *Id.* at 1111-14. (Sens. Kennedy and Morse).

[55] *Id.* at 1111 (Sen. Morse); 1105-06 (Sen. Javits); 1108 (Sen. Johnson).

allege that S.1555 was inadequate in the protections it afforded, asserting instead that additional areas of union affairs had to be governed by federal legislation.[56] In short, there is nothing in the legislative debate which suggests that the McClellan amendment was intended to provide union members with additional means of enforcing the bill's safeguards concerning the mechanics of union elections of officers.

The McClellan amendment, adopted by a vote of 47-46 on April 22, 1959, represented the high-water mark of proposed federal regulation of internal union affairs.[57] It was replaced in its entirety two days later by the more moderate proposal of Senator Kuchel designed to "remove the extremes raised by the [McClellan] amendment." [58] As with the McClellan amendment, the debate over the Kuchel substitute evidences that it was intended to articulate "fundamental" rights, not supplement the more specific provisions of the bill which addressed particular problems. Significantly, questions which arose during the course of the debate concerning application of the generalized statements in the "bill of rights" to specific officer-election issues were resolved by referring to the more detailed procedures contained in the section of the bill containing the regulations for elections of officers.[59] The House subsequently approved this compromise "bill of rights" without even considering it in committee.[60]

2. *The Title I Enforcement Scheme*

The difference between the McClellan and Kuchel amendments which is most crucial to this case is that

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[56] *Id.* at 1113. (Sen. Carroll).

[57] *Aaron, supra* n.28, 73 Harv. L. Rev. at 859.

[58] II Leg. Hist. at 1234 (Sen. Cooper); *See also, Aaron, supra* n.28, 73 Harv. L. Rev. at 859-60.

[59] II Leg. Hist. at 1232-33.

[60] *Cox, supra* n.37, 58 Mich. L. Rev. at 832-33.

enforcement of Title I rights under the former was vested in the Secretary of Labor, while the latter proposal permitted individual union members to file suit.[61] The First Circuit erroneously cited the adoption of the Kuchel amendment's private enforcement scheme as an indication of Congressional mistrust of the Secretary of Labor's ability to enforce the "bill of rights" and as evidence that Congress considered the "bill of rights" provisions to be of greater importance than the Title IV election provisions (Pet. App. B at 59a, 61a, 63a, 67a).

Such conclusion ignores the Senate's concern that the McClellan amendment would establish a precedent of federal government enforcement of the rights of private individuals. Southern Senators in particular were outspoken in their belief that such a proposal would create a precedent for federal enforcement of civil rights matters.[62] It is indicative of the extent of that concern that the first Senator to discuss the substantive advantages of the Kuchel amendment addressed precisely that issue.[63]

The legislative debate also belies the circuit court's suggestion that Congress was concerned that the Secretary would not diligently enforce the statute. On the contrary, several Senators expressed support for the Kuchel amendment's private enforcement scheme precisely because they believed that the Secretary would become too involved in the affairs of unions under the McClellan proposal.[64] Indeed, Congress' continued faith in the Secretary's ability to perform the tasks assigned by the bill is confirmed by the Senate conferees' insistence

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[61] *Compare*, II Leg. Hist. at 1102 (Section 103) *with* 1221 (Section 102).

[62] *Aaron, supra* n.28, 73 Harv. L. Rev. at 859.

[63] II Leg. Hist. at 1223-24 (Sen. Johnston). Ultimately, all of the Southern Senators, including Senator McClellan voted for the Kuchel substitute. *Aaron, supra* n.28, 73 Harv. L. Rev. at 859.

[64] II Leg. Hist. at 1238 (Sens. Javits and Kefauver).

during the conference with the House that the Secretary, rather than individuals, be given exclusive authority to file suits for election violations. The final bill included such provision.

Nor does the legislative history support the circuit court's conclusion that Title I rights were intended to be superior in importance to those set forth in Title IV. This theory relies upon the mistaken notion that since Title I was added after Title IV was formulated, the Senate adopted the former to buttress the latter. *Kupau* v. *Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980). As previously noted, Title I was adopted to protect rights not regulated by Title IV. See pages 21-23, *supra*. Additionally, this theory of Title I superiority based upon the timing of its adoption by the Senate ignores the significant modifications made to the election title after the McClellan and Kuchel "bill of rights" amendments were adopted.[65]

In short, the adoption of a private enforcement scheme for Title I was entirely unrelated to any fears that the Secretary of Labor was incapable of acting in this area or that Title I rights were more important than, or a supplement to, Title IV's guarantees. The legislative history clearly reflects that Congress was motivated by other concerns in deciding to permit individual union members to file suit under Title I.

C. The Rulings Below Contravene Decisions of This Court Which Have Interpreted The LMRDA Based On The Intent of Congress As Expressed In The Act and The Legislative History

This review of the legislative history confirms that Title IV, not Title I, is the special "vehicle" through which Congress sought to insure democracy in elections

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[65] See, II Leg. Hist. at 1123 (Sen. Dodd); 1159-60 (Sen. McClellan); 1208-09 (Sen. Morse); 1240-42 (Sen. Javits); 1245, 1253-54 (Sen. Mundt).

of union officers. *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 498 (1968). Title I was not intended to be an alternate "enforcement mechanism" for redressing election violations, as the lower court found here (Pet. App. A at 10a). Rather, the exclusive federal remedy adopted by Congress to resolve disputes concerning elections of officers was for the union to conduct a supervised election. *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 475 (1968). Moreover, the legislative history leaves no doubt that the sole agent selected by Congress to supervise that rerun election was the Secretary of Labor, not a district court or its designee. *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964). Only by conducting a rerun election under the Secretary's supervision could the effects of an improper election be purged. *Glass Bottle Blowers*, 389 U.S. at 474.

Permitting broad Title I relief in an election context ignores the deliberate rejection by Congress of proposals for federal pre-election remedies in favor of the post-election mechanisms set forth in §§ 402 and 403. Those procedures further the "long-standing policy against unnecessary governmental intrusion into internal union affairs," *Glass Bottle Blowers*, 389 U.S. at 470-71, a policy which recognizes that, even under the best of circumstances, such elections are disruptive of the normal conduct of a union. *Hodgson* v. *Local Union 6799, USWA*, 403 U.S. 333, 339 (1971). By channelling election protests through the union's internal review processes, the Act affords the union an opportunity to redress any violation and avoids government interference unless and until the union has failed to act. *Glass Bottle Blowers*, 389 U.S. at 472. Thereafter, the Secretary of Labor is authorized to screen frivolous complaints and centralize in a single proceeding such litigation as might be warranted. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 532 (1972). The remedy was intended to prevent a union member from delaying the conduct of an election of officers, *Calhoon*, 379 U.S. at 140, and to expeditiously

resolve election challenges which cloud the incumbents' title to office. *Glass Bottle Blowers*, 389 U.S. at 468 n.7. Not even the most ardent critics of the *Calhoon* decision have contested the Secretary of Labor's sole and exclusive authority to conduct rerun elections or suggested the availability of such relief under Title I.[66]

Nonetheless, the lower court interpreted more recent decisions of this Court as inviting greater judicial activism in union election disputes (Pet. App. B at 52a). Yet neither *Trbovich*, nor *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), can be read as undercutting *Calhoon*. Nor do they authorize the lower court to entertain private enforcement suits intended to harass an offending union.[67]

In *Trbovich*, this Court held that § 403 did not preclude a union member from intervening in a suit filed by the Secretary but, consistent with the statutory scheme, severely restricted the intervenor's role so that it "did not interfere with the screening and centralizing functions of the Secretary." 404 U.S. at 532-33. And the *Bachowski* decision merely required the Secretary to issue a statement of reasons for not filing suit in response to a member's § 402 complaint, the Court finding nothing in the legislative history reflecting a Congressional intent to exempt such decisions from judicial review. 421 U.S. at 567-68. However, the Court limited the scope of judicial inquiry, specifically rejecting the lower court's authorization of a "trial-type inquiry into the factual bases of the Secretary's conclusion that no violations oc-

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[66] *See, e.g., Pre-Election Remedies Under the Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of Titles I and V*, 74 Col. L. Rev. 1105, 1114 (1974); Harris, *Titles I and IV of the LMRDA: A Resolution of the Conflict of Remedies*, 42 U. Chi. L. Rev. 166, 168, 177 (1974).

[67] Pet. App. B at 52a; *Bunz* v. *Moving Picture Mach. Operators' U.*, 567 F.2d 1117, 1124 (D.C. Cir. 1977); *Kupau* v. *Yamamoto*, 622 F.2d 449, 456 (9th Cir. 1980).

curred affecting the outcome of the election." *Id.* at 566, 572-73.

Rather than undercutting the argument in favor of narrow Title I relief in election-related suits, both cases reaffirm the validity of the *Calhoon* decision. Of direct relevance to the instant case, *Trbovich* cited *Calhoon* as prohibiting "union members from initiating a private suit to set aside an election," 404 U.S. at 531, the remedy sought and obtained by plaintiffs here.[68] And *Bachowski* limited suits "concerning the conduct of the election itself . . . to the post-election procedures specified in 29 U.S.C. § 482." 421 U.S. at 566.

The most recent decisions of this Court continue to identify Title IV, not Title I, as the source of remedies for election violations. In *Steelworkers* v. *Sadlowski*, —— U.S. ——, 72 L. Ed.2d 707, 714 (1982), the Court reaffirmed that the legislative history revealed that Title I was intended to provide general protections for basic rights not specifically spelled out in other portions of the bill, not to supplement the election provisions already set forth in what is now Title IV. Indeed, in *Finnegan* v. *Leu*, —— U.S. ——, 72 L.Ed.2d 239, 246 n. 10 (1982), the Court noted that the only specific attempt on the floor of the Senate to strengthen the enforcement provisions regarding union elections was contained in an amendment to § 506 of the bill, the precursor of § 609 of the Act.[69]

Not only is the lower court's interpretation of the legislative history inconsistent with the decisions of this

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[68] From the outset, plaintiffs here have recognized that if the district court granted the relief requested, the Union would be required to conduct a new election (JA 80).

[69] That amendment, proposed by Senator Prouty after the McClellan amendment was adopted, would have imposed criminal penalties for violations of Title IV. II Leg. Hist. at 1116, 1140. The amendment was rejected by the Senate. *Id.* at 1141.

Court but the public policy reasons advanced as justification for extensive judicial intervention in union elections under Title I constitute an attempt to substitute the lower court's judgment for that of the Congress.[70] The appellate court's primary concern is that without pre-election federal remedies for election misconduct, rights which may be characterized as arising under Title I will not be enforced unless it can be mathematically determined that any violation "may have affected the outcome of the election" (Pet. App. B at 65a-66a). That concern has been expressed in a law review article cited by the lower court[71] and reflects the concerns advanced by the ACLU during the legislative debate. As we have seen, Congress repeatedly rejected the ACLU's proposals for federal pre-election relief. Moreover, unlike the question addressed in the law review article, the issue in this case is not whether a district court has *any* authority to remedy Title I violations in a pre-election context but, rather, whether that authority extends so far as to include ordering a union to rerun its election.

Congress specifically stated that it did not want the extraordinary remedy of rerunning elections of officers triggered by "technical" violations of the statute. *Wirtz* v. *Hotel Employees Union*, 391 U.S. at 505 n.11. For that reason, the Secretary was charged with the dual role of determining whether a violation occurred and whether the violation "may have affected the outcome" of

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[70] Moreover, many of those policy reasons were advanced in Congress, primarily by the ACLU, in support of proposals granting more extensive pre-election remedies, and were repeatedly rejected. See, Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs*, *supra* n.27, 44 Ill. L. Rev. 631; Rothman, *Legislative History of the "Bill of Rights" for Union Members*, *supra* n.27, 45 Minn. L. Rev. at 201-03; *The Election Labyrinth: An Inquiry Into Title IV of the LMRDA*, 43 N.Y.U.L. Rev. 336, 358 (1968).

[71] Pet. App. B at 65a; Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407 (1972).

an election.[72] Yet if the Secretary was explicitly not empowered to set aside an election for minor technical violations of the statute, it is totally unreasonable for the lower court to conclude that Title I implicitly granted that authority to a district court. Even the most fundamental rules of statutory construction require that "a matter specifically dealt with in another" part of a statute governs a section of the same act which deals generally with the issue. *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944). And here, it is clear that the provisions of Title IV more specifically address election issues than the individual right provisions of Title I.

D. Conclusion

The lower court's expansive vision of a district court's role in fashioning Title I relief in the context of an election of officers is directly contrary to the legislative history and ignores the unanimity with which members of both Houses of Congress vested the responsibility for supervising union elections in the Secretary of Labor. No other court has ventured so far as to suggest that the exclusive Title IV remedy of conducting a rerun election can be ordered by a district court acting under Title I. Affirmance of the lower court here will, of necessity, create judicial remedies for election violations which were repeatedly rejected by Congress. The lower courts' holdings usurp the Secretary's authority and erode the protection for both members and unions which were carefully and deliberately incorporated in the statutory enforcement scheme.

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[72] That task has been facilitated by this Court's determination that establishment of a statutory violation creates a presumption that it affected the election's outcome. *Hotel Employees Union*, 391 U.S. at 507.

II. AN ELECTION IS "CONDUCTED" ONCE THE RELIEF REQUESTED NECESSITATES THE VOIDING OF BALLOTS AND THE RERUN OF THE ELECTION

Disregarding this Court's admonition that, in interpreting the LMRDA, courts "must look to the objectives Congress sought to achieve, and avoid placing great emphasis upon close construction of the words," [73] the lower court focused on the phrase "already conducted" in § 403 to determine whether the district court had jurisdiction over the Complaint in this case (Pet. App. B at 61a-67a). After conceding that the "legislative history on this point is unclear," *Id.* at 62a, the lower court concluded, based primarily on questions of public policy, that an election is not "already conducted [until] all the ballots are counted." *Id.* at 67a. Thus, according to the First Circuit, the district court was able to retain jurisdiction in this case by issuing a temporary restraining order at 4:20 p.m. on December 12, 1980, which enjoined the collection and tabulation of mail ballots scheduled for 9:00 a.m. on December 13. Neither the legislative history nor concerns of public policy warrant such a conclusion.

A. The Legislative History of § 403

As we have already shown, the major debate over the precursors to § 403 concerned the extent to which the new federal legislation would pre-empt existing state laws regulating union elections. S.3974, introduced in 1958, pre-empted all state laws and precluded private court litigation over election violations.[74] The Kennedy-Ervin bill, S.505, contained similar language when introduced in 1959,[75] but the bill which emerged from the Labor and Public Welfare Committee preserved existing

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[73] *Glass Bottle Blowers*, 389 U.S. at 468 and n.6.

[74] S. Rep. No. 1684, *supra* n.30, at 13.

[75] I Leg. Hist. at 64 (§ 303).

state remedies "prior to the conduct" of an election. Thereafter, federal remedies were to be exclusive.[76] These changes were adopted at the urging of the ACLU, among others, to preserve the availability of state courts to provide prompt relief for specific violations in order to avoid the more extreme remedy of rerunning an entire election in response to a post-election complaint.[77]

Since neither side of the controversy focused on the point at which an election was "conducted," although both agreed that the purpose of § 403 was to preserve existing state remedies, it is pertinent to consider the remedies available in state courts in 1959. Such a study was undertaken by Professor Clyde Summers in a survey of decisions rendered by state courts in New York during a ten year period.[78] His findings confirm that the state courts were active in adjudicating union election disputes arising before the start of the voting but were reluctant to interfere in elections already in progress where the effect of any relief would require that a new election be conducted.[79] Of particular importance in the instant case is Professor Summer's observation that "casting ballots is not the beginning but the culmination of the election process" [80] and his conclusion that "most suits brought during the period of balloting by mail should be considered as post-election, for the defect may be beyond cor-

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[76] *Id.* at 378 (§ 303).

[77] Summers, *Preemption and the Labor Reform Act-Dual Rights and Remedies*, 22 Ohio State L.J. 117, 136-37 (1961).

[78] Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1223 (1961). Summer's findings were presented to the Senate Labor and Public Welfare Committee during its hearings in 1958. *Union Financial and Administrative Practices, Hearings Before the Senate Subcommittee on Labor and Public Welfare*, 85th Cong., 2d Sess. 610 (1958) (statement of Clyde Summers).

[79] Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. at 1244-45, 1247.

[80] *Id.* at 1243.

rection and any remedy would require a new election." [81] These conclusions are consistent with the observations of the district court here, as well as of the arbitrator assigned by the court to conduct the rerun election, to the effect that most members who vote in a mail ballot election do so immediately upon receipt of the balloting materials (R. 580-81). The instant lawsuit was filed after the mail ballot packages had been distributed to the Local Union's membership and balloting had commenced.

Based on the legislative record, it is appropriate to conclude that Congress only intended to preserve those state remedies then available, and to create federal remedies where it was necessary to set aside an election, once such relief became the only means of redressing a violation of the union's bylaws or statute. The absence of specific federal remedies for pre-election violations, with the exception of § 401(c), leads to the inescapable conclusion that the remedies set forth in the Act are exclusive.[82] Moreover, since the remedy of conducting a rerun election is set forth in Title IV and is the exclusive federal remedy for election violations, any election must be considered "already conducted" at the point at which the requested relief necessitates the conduct of a new election. Plaintiffs concede that at the time this suit was filed that point had been reached, inasmuch as the relief requested required a new election to be held. (JA 80)

B. The Public Policy Concerns

The Circuit Court asserted that its statutory construction would assist in the accomplishment of the legislative goals discussed previously. Yet the other courts which

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[81] *Id.* at 1247 n.143. Professor Summers has long championed federal pre-election remedies, referring to them as "the only ones of any practical value." *Id.* at 1248. *See also*, 22 Ohio State L.J. 119, *supra* n.77.

[82] *The Election Labyrinth: An Inquiry Into Title IV of LMRDA*, *supra* n.70, 43 N.Y.U. L. Rev. at 358.

have considered the question of when the exclusivity of § 403 attaches have agreed that these legislative goals are more likely to be satisfied if an election were considered to have been "already conducted" at some point before the conclusion of the ballot tabulation. Such an interpretation has been found to be consistent with this Court's decision in *Calhoon* and to satisfy the "general congressional policy . . . to allow unions great latitude in resolving their own internal controversies" as well as to utilize the Secretary of Labor's expertise to redress violations not remedied by the unions. *Jennings* v. *Carey*, 57 L.R.R.M. 2635, 2641 (D.D.C. 1964). The Court of Appeals for the Second Circuit has held that pre-tabulation complaints resulting from "practices subsequent to the nomination and voting" must be resolved under § 402. *Libutti* v. *DiBrizzi*, 337 F.2d 216, 218 (2d Cir. 1964). *Cf. Robins* v. *Rarback*, 325 F.2d 929 (2d Cir. 1963), *cert. denied*, 379 U.S. 974 (1965) (federal courts should not entertain pre-election complaints which require an election to be set aside). And the Third Circuit has agreed that any definition of "conducted" which postpones the exclusivity of § 403 until after the ballots have been tabulated would increase the probability of judicial interference in an area specifically reserved for the Secretary. *McDonough v. Local 825, Operating Engineers*, 470 F.2d 261, 264 (3d Cir. 1972).

In elections which utilized mail ballots, such as the instant case, the only courts which have considered the point at which an election has been "already conducted" have followed the state law as it existed in 1959 [83] and concluded that judicial intervention must be precluded "after the actual voting process is under way." *Laski* v. *Intern. Org. of Masters, Mates & Pilots*, 502 F. Supp. 134, 136 (S.D.N.Y. 1980); *New Action Coalition* v. *Local 2, United Fed. of Teachers*, 510 F. Supp. 1208, 1211 (S.D. N.Y. 1981). Those courts have held that for a court to

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[83] *See* note 81, *supra*.

reach the merits of a case "after the election has advanced to the voting state opens the door to significant federal court interference in union election practices . . . a result inconsistent with the policies of Title IV." *Laski*, 502 F. Supp. at 136.

This case amply demonstrates the wisdom of such judicial restraint. The district court's decision to grant a temporary restraining order in this case was issued not merely "after the actual voting process [was] under way", but after every phase of the election, with the exception of the actual ballot tabulation, had been completed.

Consequently, the mechanistic finality of counting the ballots after the election was run, and the announcement of results, was delayed for an entire year while the district court investigated the alleged violations and then attempted to fashion election procedures without the benefit of the expertise of the Secretary of Labor, two events which Congress specifically intended to avoid. *Calhoon* v. *Harvey*, 379 U.S. at 140. During the delay, the Local Union was run by lame duck officers, an eventuality Congress recognized as a reason for precluding federal pre-election relief.

The election subsequently conducted by the district court was unusually burdensome to the Union and its members not only in terms of the delay, but also in its expense. While a union is not charged for the expenses incurred by the Secretary of Labor in conducting a rerun election, in the instant case, this 700 member local union was required to pay the third parties appointed by the district court a total of $7374.96 (JA 15, June 2) for their services,[84] exclusive of the cost of printing and mail-

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[84] This cost, in excess of $10.00 per member, is in contrast to the cost incurred by unions which have voluntarily retained third party supervisors to conduct their elections (approximately $2.00 per ballot). (Brief App. at 7a-9a).

ing the balloting materials. In addition, the district court currently has under consideration an application for attorney fees in the amount of $60,000.00 which was filed by plaintiffs' counsel before the appeal to the First Circuit. (Brief App. at 2a-5a)

This Court has recognized in other contexts the necessity of protecting the financial viability of unions. *IBEW* v. *Foust*, 442 U.S. 42, 50-51 (1979). Those concerns are no less valid here. Indeed, the expenses borne by the Union here are even more unreasonable than in the average "duty of fair representation" case since all of the relief provided to these plaintiffs could have been obtained without cost to them, and at minimal cost to the Union, had they utilized the procedures set forth in § 402.

Moreover, the burdens imposed by this case could have been greatly compounded had additional suits been brought by other members or had the Secretary decided to bring an independent suit in response to a separate post-election complaint filed under § 402. Without the Secretary to perform the screening and consolidation functions assigned by Congress,[86] there is nothing to prevent a multiplicity of lawsuits involving a single election. In each of the cases cited below, pre- and post-election litigation resulted from the district court's decision to consider pre-election complaints which had been carefully drafted to include an allegation that Title I rights had been violated in the context of a union's election of officers. *Kupau* v. *Yamamoto*, 622 F.2d at 452-3; *Colpo* v. *Teamsters, Local 326*, 504 F. Supp. 573, 574 (D. Del. 1980), *aff'd*, 659 F.2d 399 (3d Cir. 1981); *Rollison* v. *Hotel Employees, Local 879*, 677 F.2d 741, 743 (9th Cir. 1982).

Despite these concerns, the circuit court cited several reasons for utilizing Title I to grant pre-election relief. The circuit court asserted that Title I gave a district court greater flexibility to correct violations in a pre-

[86] *Trbovich* v. *United Mine Workers*, 404 U.S. at 532.

election context than the post-election remedies available under Title IV.[86] Regardless of the merits of this argument, it ignores the axiom that the courts are not free to substitute their judgment for that of the Congress or to modify the legislative scheme merely because, in the court's view, another procedure would be more effective.[87] To the extent that the lower court's "flexibility" argument reflects some commentators' discontent with the Secretary of Labor's performance of the tasks assigned by the Act (Pet. App. B at 65a-66a), it is apparent that such complaints must be remedied by legislative action or litigation compelling the Secretary to carry out his statutory responsibilities.[88] *UAW* v. *Nat. Right To Work*, 590 F.2d 1139, 1155 (D.C. Cir. 1978). Simply stated, such statutory revisions must be left to the Congress, not the courts.

The circuit court's interpretation of § 403 will delay the Secretary of Labor's exclusive jurisdiction over election complaints and afford district courts the maximum opportunity to examine the technical details of union elections. Members seeking to avoid the Title IV enforcement

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[86] Pet. App. B at 66a. The lower court's contention that Title I rights will not be enforced unless a violation can mathematically have affected the outcome has been discussed previously. *See*, p. 29-30 *supra*.

[87] A prime example is the lower court's suggestion that voting fraud could be remedied prior to the completion of an election by requiring the union to distribute additional ballots, thus avoiding having to conduct a new election to correct such a violation. Yet, Congress specifically anticipated the possibility of such a violation and deliberately chose the post-election procedures of § 402 to be utilized to provide a remedy. II Leg. Hist. at 1140. (Sens. Kennedy and Prouty).

[88] Moreover, the appellate court has overlooked the considerable flexibility vested in the Secretary and the courts in fashioning Title IV relief after an election violation has been established. *Usery* v. *Local 639, IBT*, 543 F.2d 369, 387-88 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977).

mechanisms will be encouraged to race to the courthouse and file a complaint under Title I before the last ballot is counted. Indeed, in *Jennings* v. *Carey*, 57 L.R.R.M. at 2636, the suit was filed after all but 6,000 of some 130,000 ballots were tabulated, while in *McDonough* v. *Local 825, Operating Engineers*, 470 F.2d at 263, the complaint sought to enjoin the recount of certain challenged votes.[89] Applying the First Circuit's rule would have extended Title I jurisdiction to both complaints.

The effect of the lower court's ruling is that most violations now processed by the Secretary could be construed to lie within the jurisdiction of Title I, since the vast majority of such complaints involve events which occur prior to the completion of the ballot tabulation. The only statutory requirements with which a union must comply after the tabulation are posting of the results and preservation of the ballots. § 401(e), 29 U.S.C. § 481(e). All of the remaining Title IV obligations attach prior to the completion of the ballot count and skillful attorneys should be capable of cloaking a violation of one of those provisions in Title I rhetorical garb. *Driscoll* v. *Int'l U. of Op. Eng., Local 139*, 484 F.2d 682, 686-87 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

Moreover, even were a court to assert Title I jurisdiction to review a union election, the court's examination must necessarily be carried out within the framework of Title IV, for the simple reason that only Title IV specifies election standards against which the union's actions may be measured.[90] Yet, as then-Solicitor General Archi-

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[89] The Third Circuit has recently characterized *McDonough* as a "suit filed post-election but before ballots were counted." *Kraska* v. *United Mine Workers*, 686 F.2d 202, 206 (3d Cir. 1982).

[90] In the instant case, when it came time for the district court to specify election procedures for the Local Union to utilize in the rerun election, the discussion concerned Title IV's requirements and the Secretary of Labor's interpretive guidelines. 29 C.F.R. § 452.1 *et seq.* (R. 578-79, 582-83).

bald Cox noted in the Government's amicus brief in *Calhoon* v. *Harvey*, allowing the district courts to bypass the Secretary of Labor and interpret Title IV's regulations

> would mean that these sensitive questions could be brought directly before the federal courts in pre-election actions with the result that all elections might be precluded for an extended period of time while litigation was resolved and appealed. Such an intent should not be attributed to a Congress which enacted this statute [LMRDA] to require, not delay, elections and which took such pains to limit pre-election remedies.

The construction of the phrase "already conducted" utilized by the First Circuit would facilitate such disruptive intrusions in union affairs. It is inconsistent with the legislative history and the decisions of other circuit courts of appeals which have considered the question. It substitutes the court's judgment for that of Congress and grants remedies judicially which various interest groups were unable to obtain legislatively in 1959. By delaying the attachment of the exclusivity of Title IV, the lower court encourages individual union members to circumvent the administrative procedures of Title IV, consequently embroiling the district courts in lengthy, politically charged litigation over the technical details of union elections.

It is submitted that the election in this case was "already conducted" at the time suit was filed, because the balloting process had already commenced and the relief requested required the voiding of ballots and the conduct of a new election. Consequently, the district court lacked jurisdiction to act under Title I, as the exclusive remedy was prescribed by Title IV.

CONCLUSION

For the reasons set forth above, a district court should not be permitted to grant relief requiring a union to conduct a new election of officers, whether the court acts on the predicate that it has legitimate Title I jurisdiction or based on the claim that an election had not been "already conducted." The decision below should be reversed, and the case should be remanded with instructions that the Complaint be dismissed, the injunctions issued dissolved, and the ballots cast in the December 13, 1980 election released to the Local Union.

Respectfully submitted,

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GARY S. WITLEN
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KATHRYN M. NOONAN
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Counsel for Petitioners

APPENDIX

APPENDIX

NOTICE OF RESCHEDULING OF HEARING ON CONTEMPT AND CONFERENCE ON ATTORNEYS' FEES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETS

No. CA 80-2680-K

JEROME CROWLEY, *et al.*

v.

LOCAL 82, *et al.*

TAKE NOTICE that the above-entitled case has been RESCHEDULED FOR HEARING AND CONFERENCE at 3:00 p.m., on Thurs., March 31, 1983, at U.S. District Court, Courtroom #11, Third Floor, U.S. Courthouse, Post Office Square, Boston, MA 02109.

Date February 24, 1983

GEORGE F. MCGRATH
Clerk

By /s/ Ellen M. Hayes
ELLEN M. HAYES
Deputy Clerk
Tel. 223-1638
223-2845

To Kurt Pressman, Esq.
Benjamin Hiller, Esq.
Mark Stern, Esq.
Kathryn N. Noonan, Esq.
Gary S. Witlen, Esq.
Paul H.J. Keenan, Esq.
Lawrence E. Katz, Esq.
Donald J. Wood, Esq.

[1]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Citation Omitted in Printing]

PLAINTIFFS' MOTION FOR AN AWARD OF LEGAL FEES

Now come the Plaintiffs in the above entitled action and move for an award of attorneys fees to be made to them or their counsel in this action in the first instance against the Defendants Griffiths and Harris, and/or in the second instance against the Defendant Local 82 for the services provided by their counsel in obtaining preliminary injunctive relief required on account of said Defendants unlawful conduct and benefiting all the members of said union.

And for their reasons they incorporate the facts and reasons set forth in the appended Affidavits and Verified Time and Expense Records [2] appended hereto, and the further reasons set forth in their accompanying Memorandum of Law.

The Plaintiffs state that said Affidavits and records contain information as set forth below:

1. That the Attorneys performed services for the Plaintiffs in the following separate categories:

(a) services rendered solely to obtain the relief granted Plaintiffs by the Court;

(b) services rendered to obtain said relief and to seek other relief, which was not afforded Plaintiffs by the Court;

(c) services rendered solely to seek relief which was not afforded to the Plaintiffs by the Court; and

(d) services rendered solely to preserve the relief which was granted to the Plaintiffs by the Court.

2. That these services required the expenditure of the following numbers of hours by the following Attorneys and other persons, divided into the several categories described in paragraph #1 above:

MARK STERN

(a) 170.9
(b) 80.6
(c) 5.6
(d) 5.0

KURT PRESSMAN

(a) 90.5
(b) 38.4
(c) 10.0
(d) 5.2

BENJAMIN HILLER

(a) 156.8
(b) 48.5
(c) 19.5
(d) 4.2

DARCY DUMONT

(a) 58.6
(b, c & d) none

JAMISON BELL

(a) .2
(b) none
(c) 5.6
(d) none

EILEEN BRADY AND CAROL CALLIOTTE

(a) 12.3
(b, c & d) none

[3]

3. For these services, the Plaintiffs request compensation at the following rates and in the following amounts for the following Attorneys and other persons, according to the several categories described in paragraph #1 above:

MARK STERN

(a)	$100.00/hr.	$17,090.00
(b)	$70.00/hr.	$5,642.00
(c)	$30.00/hr.	$168.00
(d)	$100.00/hr.	$500.00

KURT PRESSMAN

(a)	$80.00/hr.	$7,240.00
(b)	$50.00/hr.	$1,920.00
(c)	$25.00/hr.	$250.00
(d)	$80.00/hr.	$416.00

BENJAMIN HILLER

(a)	$60.00/hr.	$9,408.00
(b)	$40.00/hr.	$1,940.00
(c)	$20.00/hr.	$390.00
(d)	$60.00/hr.	$270.00

DARCY DUMONT

(a)	$35.00/hr.	$2,051.00
	(b, c & d) none	

[4]

JAMISON BELL

(a)	$20.00	$4.00
	(b) none	
(c)	$7.50	$135.00
	(d) none	

EILEEN BRADY AND CAROL CALLIOTTE

(a)	$10.00	$123.00
	(b, c & d) none	

4. Hence Plaintiffs request that the following amounts be determined to be the appropriate "lodestar" amount of legal fees determined to be applicable under this motion by the Court:

(a)	$35,916.00
(b)	$9,502.00
(c)	$135.00
(d)	$943.00

Total $47,547.00 Lodestar

5. For the reasons set forth in their Memorandum of Law, the Plaintiffs request that the Court award a total of $60,000.00 in fees to Plaintiffs or their Attorneys, which number includes the amounts set forth hereinafter for expenses made by them related to this litigation:

Filing fee:	$60.00
Duplicating costs:	$200.00
Delivery charge:	$30.00

By their counsel

/s/ Mark D. Stern
MARK D. STERN

/s/ Kurt M. Pressman
KURT M. PRESSMAN

/s/ Benjamin Hiller
BENJAMIN HILLER

Goldstein, Pressman and Stern
678 Massachusetts Avenue
Cambridge, Ma. 02139
(617) 492-2211

CERTIFICATE OF SERVICE

I Kurt M. Pressman, swear under the pain and penalty of perjury that I have caused a true and accurate copy of the following:

1. Motion for Award of Legal Fees;

2. Memorandum in Support Thereof;

3. Motion for Order directing Defendants to give an accounting of fees expended.

to be delivered by regular course of mail, postage prepaid to Counsel for the Defendants, Gary S. Witlen, 25 Louisiana Avenue, N.W., Washington, D.C. 20001; and delivering in hand to Counsel for Defendants Katherine Noonan, Esq. at 6 Beacon Street, Boston, Ma. this 26th day of August, 1981.

Signed,

Kurt M. Pressman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 80-2680-K

JEROME CROWLEY, *et al.*,
Plaintiffs

vs.

LOCAL 82, *et al.*,
Defendants

FURHER HEARING ON EXPENSES AND FEES
BEFORE THE
HONORABLE ROBERT E. KEETON, U.S.D.J.

Courtroom 11
United States Courthouse
Boston, MA 02109
June 2, 1982

• • • •

[82] MR. WITLEN: The union calls Murray Schwartz.

MURRAY SCHWARTZ, duly sworn

DIRECT EXAMINATION
BY MR. WITLEN

Q Mr. Schwartz, could you state your name and address for the record, please?

A Murray Schwartz, 8 Frost Pond, Roslyn, New York, 11576.

Q Mr. Schwartz, are you currently employed?

A Yes, I am.

Q And what is your present place of employment?

A The Honest Ballot Association.

Q Could you tell us what position you hold with that association?

A I'm the president.

Q How long have you been president of the Honest Ballot Association?

A Since October of 1980.

Q Were you employed prior to that time?

A Yes, I was.

[83] Q By whom?

A I was employed as a Commissioner of Commerce and Industry in the City of New York.

Q And were you employed prior to that?

A Yes, I was.

Q In what capacity?

A I was a state senator for the State of New York.

Q During the time that you were a state senator, were you assigned to any particular committee in the senate?

A My committee was the Elections Committee.

• • • •

[87] Q On what basis does the Honest Ballot Association [88] charge a union when it conducts its elections?

A Well, every election is different. We tailer-make them. But when we make a quote on a ballpark figure, we use $2 a vote.

Q You charge on a per-ballot basis?

A Yes, we do.

Q And that figure is what?

A $2 per vote.

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